

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel.	)	
GENTNER DRUMMOND, in his official	)	
capacity as ATTORNEY GENERAL OF	)	
OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 26-cv-00450-SEH-SH
	)	
CENTURY ALUMINUM COMPANY, a	)	
Delaware corporation; and ALUMINUM	)	
OKLAHOMA, LLC d/b/a OKLAHOMA	)	
PRIMARY ALUMINUM, LLC,	)	
	)	
Defendants.	)	

**PLAINTIFF’S REPLY IN SUPPORT OF ITS MOTION TO REMAND
AND FOR AN AWARD OF COSTS AND ATTORNEY FEES
UNDER 28 U.S.C. § 1447(c)**

INTRODUCTION

Defendants’ response confirms what the Notice of Removal left unsaid. Defendants tell the Court that they do not invoke complete preemption and do not contend that the Clean Air Act (CAA) converts the State’s claims into federal ones. Doc. 20 at 12; *id.* at 2 n.2. They then explain that a federal statute “need not completely preempt state law claims in order to have preemptive effects, such as conflict preemption and field preemption.” *Id.* at 9 n.8. The rest of the brief is devoted to three decisions about whether federal law displaces state nuisance law. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *North Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (“*AEP*”). Defendants frame the question presented as “whether a court applying state nuisance law may prohibit construction of a major stationary source, or prescribe source-specific operating conditions, before completion of the PSD [prevention of significant deterioration] process established by Congress.” Doc. 20 at 9. Those arguments amount, at most, to a *defense*. And it is binding precedent in this Circuit that a defense cannot support removal “even if the defense is anticipated in the plaintiff’s complaint, and even if both parties admit that the federal defense is the only question truly at issue in the case.” *Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1255 (10th Cir. 2022) (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 14 (1983)).

Nowhere in twenty-five pages do Defendants identify an element of either claim in the Petition that federal law supplies. They locate the federal question instead in the relief the State requests, calling it “embedded in the AG’s requested remedy.” Doc. 20 at 2 n.2. But *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005), does not reach that far. The federal issue must be “necessarily raised” by the claim, which means an “essential element” the plaintiff must establish. *Suncor*, 25 F.4th at 1266. Every element of these claims comes from OKLA. STAT. tit. 50, §§ 1–2, and OKLA. STAT. tit. 27A, § 2-6-105(A), as Defendants’ own recitation of the elements confirms, Doc. 20 at 14–15 (reciting

the elements as “proof that Defendants will commit an ‘unlawful’ act or omission, and clear and convincing evidence of a reasonable probability of injury” and “proof that the facility ‘is likely to cause pollution,’” and citing only Oklahoma statutes and decisions for both).

The Court should remand this action to the District Court of Rogers County and award the State its costs and fees under 28 U.S.C. § 1447(c).

ARGUMENTS AND AUTHORITIES

I. *Suncor* Controls and Defeats This Removal.

Suncor is binding precedent in this Circuit. There, Colorado municipalities pleaded state-law nuisance and related claims against energy companies. The companies removed on several grounds, including complete preemption under the Clean Air Act and jurisdiction under *Grable*. *Suncor*, 25 F.4th at 1248–49. The Tenth Circuit rejected each ground and affirmed the remand order. *Id.* at 1263–75. Three of its holdings govern here. First, the Clean Air Act does not completely preempt state-law claims, because it “is designed to provide a floor upon which state law can build, not a ceiling to stunt complementary state-law actions.” *Id.* at 1263. Second, a federal issue is not necessarily raised unless it is an “essential element” of the plaintiff’s claim. *Id.* at 1266. Third, a federal issue is not substantial unless the removing party identifies “a concrete federal law or regulation that the case definitively implicates,” rather than a federal policy the suit is said to disturb. *Id.* at 1268.

Defendants retort that *Suncor* involved damages rather than an injunction and involved no pending permit. Doc. 20 at 2, 10–11. Neither distinction reaches the Tenth Circuit’s underlying reasoning. The elements inquiry asks what the plaintiff must prove, and the remedy a plaintiff requests does not change the elements of an Oklahoma nuisance claim. If asking for an injunction converted a state-law claim into a federal one, every equitable action against a federally regulated party would be removable, which is not the law. Nor does the pendency of a permit application supply an element. It supplies the factual setting in which Defendants propose to operate, and *Suncor* holds that a federal

regulatory setting is not a federal element. *See Suncor*, 25 F.4th at 1266–67. Defendants also call the Clean Air Act “incidental to the analysis in *Suncor*.” Doc. 20 at 10. But the Tenth Circuit devoted a section of the opinion to complete preemption under the Act. 25 F.4th at 1263–65.

Defendants also urge that *Suncor* “has not foreclosed every potential path to removal.” Doc. 20 at 25. True, but beside the point. The path they took, a contention that state nuisance relief would interfere with the Clean Air Act’s regulatory scheme, is the path *Suncor* considered and closed, *see* 25 F.4th at 1266–68, and Defendants identify no principle in that decision turning on the facts they emphasize.

II. Defendants’ Own Framing of the Question Presented Describes a Federal Defense.

Defendants initially describe the jurisdictional question as “whether a court may issue an anticipatory injunction that interrupts or supplants the federally prescribed PSD process before permit issuance.” Doc. 20 at 5. They put it a second way: does the State’s “pursuit of injunctive relief . . . impermissibly interfere with Congress’s selection of EPA/DEQ to regulate and administer emissions standards through the CAA’s permitting process?” *Id.* at 13. Both formulations ask whether federal law bars relief that Oklahoma law otherwise allows. That is preemption, whatever it is called. Absent complete preemption, which Defendants disclaim, a federal obstacle to state-law relief is a defense, and defenses do not create federal jurisdiction. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392–93 (1987); *Suncor*, 25 F.4th at 1255–56; *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1158 (10th Cir. 2004).

Defendants’ authorities make the same point. *Ouellette*, *Cooper*, and *AEP* all decided, on the merits, whether federal law displaced state-law claims. Defendants say the “underlying and recurring theme” of those decisions itself supplies “a substantial issue of federal law.” Doc. 20 at 5 n.4. That theme is preemption. None of them finds jurisdiction under *Grable*, and none holds that a preemption argument makes a case removable. The same is true of the two decisions Defendants treat as contrary, which held that the Clean Air Act does not preempt common-law claims brought under the law of

the source State. *Bell v. Cheswick Generating Station*, 734 F.3d 188, 196–98 (3d Cir. 2013); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 686 (6th Cir. 2015). Oklahoma is the source State. *Onellette*, 479 U.S. at 497. And *Cooper* was the opposite case, an effort to apply North Carolina law to sources in Alabama and Tennessee. 615 F.3d at 296. Those are merits distinctions, and the Rogers County court is “presumptively competent” to draw them. *Suncor*, 25 F.4th at 1267. *Felix* states the consequence plainly: where complete preemption does not apply, the district court “lacks power to do anything other than remand to the state court where the preemption issue can be addressed and resolved,” and that is so “regardless of the strength of the defendant’s argument” for preemption. 387 F.3d at 1158 (citation omitted). The Tenth Circuit has drawn that line for the very forms of preemption Defendants describe. Ordinary preemption, which includes conflict and field preemption, “does not render a state-law claim removable to federal court”; only complete preemption does. *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1203 & n.4, 1204 (10th Cir. 2012) (quotation omitted).

Defendants’ reliance on *AEP* is self-defeating. They say this case presents the question *AEP* expressly left open. Doc. 20 at 9. *AEP* described that question as “the availability *vel non* of a state lawsuit depend[ing], *inter alia*, on the preemptive effect of the federal Act.” 564 U.S. at 429. Defendants have thus identified their own issue as preemption. An unresolved preemption question is still a defense, and it is a defense the state court can decide.

III. No Federal Issue Is Necessarily Raised by the Elements of the State’s Claims.

The Petition pleads two Oklahoma causes of action and expressly disclaims any federal claim. Pet. ¶¶ 3, 10. Defendants answer that the State’s “disclaimer of federal claims cannot erase the federal questions his own theory of proof and requested remedy necessarily raise.” Doc. 20 at 14. The disclaimer is not offered to erase anything. It marks what the State has undertaken to prove, and the well-pleaded complaint rule “makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.” *Caterpillar*, 482 U.S. at 392. The municipalities in *Suncor*

pleaded the same way, 25 F.4th at 1248, and the Tenth Circuit affirmed remand. A disclaimer, of course, cannot defeat removal where a federal issue really is an element of a state-law claim, which is why the State does not rest on the disclaimer alone. But Defendants must still identify the element that federal law supplies. They have not.

Defendants argue that the State cannot prove an “unlawful” act or “likely” pollution without the federal permitting framework. Doc. 20 at 15. This is incorrect. Oklahoma law supplies both. Section 2-6-105(A) makes it unlawful to place wastes in a location where they are likely to cause pollution of the air, land, or waters of the state, and provides that “[a]ny such action is hereby declared to be a public nuisance.” OKLA. STAT. tit. 27A, § 2-6-105(A). The Tenth Circuit has construed that provision to reach the placement of wastes before pollution occurs, rejecting a reading under which such placement “could never be a public nuisance.” *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1024–25 (10th Cir. 2007). Defendants cite that same decision for the injunctive standard they invoke. Doc. 20 at 16 (citing *Grant*, 505 F.3d at 1023). And this Court has held that an enforcement action by the Department of Environmental Quality under subsection B “is not a prerequisite to enforcement of the statute.” *State ex rel. Drummond v. Tyson Foods, Inc.*, 653 F. Supp. 3d 937, 1057 (N.D. Okla. 2023) (citing *Grant*, 505 F.3d at 1024–25). Neither a federal permit nor a federal statute supplies an element of either claim. Defendants themselves describe the State as seeking relief “without assuming Defendants will violate a single permit condition,” and say that is “not an enforcement action as recognized by the CAA.” Doc. 20 at 7 n.5.

Defendants’ answer is that the federal issue is embedded in the remedy rather than the claim. Doc. 20 at 2 n.2, 11. *Grable* asks whether the plaintiff must prove a federal issue to prevail, not whether the relief it requests may later provoke a federal argument. *Suncor*, 25 F.4th at 1266. A remedial objection arises only if the State first establishes its claims under Oklahoma law, which is another way of saying that the objection is a defense to the injunction rather than an element of the case.

Defendants next argue that the State’s reliance on emissions projections drawn from Defendants’ own permit application makes the case federal. Doc. 20 at 14–17. Evidence is not an element. Nothing in the Clean Air Act determines whether an applicant’s own projections are probative of a threatened nuisance under Oklahoma law. The question is whether the State “can prevail on [its] claims without proving any issue of federal law,” and it can, “because the success of those claims is grounded in traditional state-law causes of action and does not depend on any federal policy or regulation.” *Suncor*, 25 F.4th at 1267. To the extent federal issues arise here, “it will be by the [Defendants] as potential defenses, which cannot create a basis for removal.” *Id.* The figures the State cites are Defendants’ figures, and the letter suspending review of them was written by a state agency.

Much of Defendants’ “necessarily raised” showing rests on the State’s Motion for Preliminary Injunction, Doc. 19, which was filed three weeks after removal. *See* Doc. 20 at 14, 16–19. But “the propriety of removal is judged on the complaint as it stands at the time of the removal.” *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1488 (10th Cir. 1991). Section 1446(b)(3) supplies the mechanism for a case that becomes removable later: a notice of removal filed within thirty days of the paper that first reveals removability. 28 U.S.C. § 1446(b)(3). Defendants filed no such notice, and they make no such argument. The provision could not help them in any event, because it authorizes a new notice of removal in a pending state-court action, and this case was already here when the motion was filed. Their position is that the federal question is “embedded in the Petition itself” and that the preliminary-injunction motion merely “confirms” it. Doc. 20 at 14. On their own theory, if the Petition raises no federal question, the later motion has nothing to confirm. And the motion asserts no federal claim; it asks the Court to apply Oklahoma nuisance law to Defendants’ own emissions numbers.

IV. Defendants Identify No Federal Issue That Is Actually Disputed or Substantial.

Defendants say the actual dispute is “whether such relief is consistent with the regulatory framework of the CAA.” Doc. 20 at 20. That is their affirmative defense stated a third time. A

disagreement about whether federal law bars a state-law remedy is not a disputed federal element of a state-law claim.

On substantiality, Defendants now point to the PSD provisions codified at 42 U.S.C. §§ 7470–7479. Doc. 20 at 21. But Defendants identify no disputed question about the meaning of any of them. Naming a statute is not the same as identifying a contested federal issue whose resolution matters “to the federal system as a whole.” *Gunn v. Minton*, 568 U.S. 251, 260 (2013); see *Suncor*, 25 F.4th at 1268. What Defendants actually describe is source-specific and fact-bound: this smelter, this application, this record, this injunction. Fact-bound, party-specific applications of federal standards are the paradigm of what *Grable* excludes. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700–01 (2006) (no jurisdiction where the federal issue was “fact-bound and situation-specific,” unlike *Grable*, where resolution of the federal issue “was both dispositive of the case and would be controlling in numerous other cases”). This Court has applied that principle to a complaint that cited a federal regulation and asked the Court to interpret it, holding that no substantial federal question was presented because the interpretive question was “more akin to a ‘defense’ . . . than to an ‘essential element’ of any cause of action.” *Nadel & Gussman, LLC v. Reed Family Ranch, LLC*, 998 F. Supp. 2d 1211, 1217 (N.D. Okla. 2014).

Defendants also invoke *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), under which a federal issue may be substantial where the federal statute itself supplies a private right of action or displaces state-law claims. Doc. 20 at 21–22; *Suncor*, 25 F.4th at 1269. That test asks what Congress did to state causes of action, not what remedy a particular plaintiff requests. The Clean Air Act does neither. It preserves state authority to adopt and enforce more stringent requirements, 42 U.S.C. § 7416, and preserves rights “under any statute or common law,” *id.* § 7604(e), which is why the Tenth Circuit describes the Act as “designed to provide a floor upon which state law can build, not a ceiling to stunt complementary state-law actions.” *Suncor*, 25 F.4th at 1263. Defendants respond that § 7416

preserves state regulatory authority but not state judicial remedies. Doc. 20 at 22. That is a merits argument about the reach of the savings clauses, and the courts to have considered the question have read those clauses to preserve common-law claims against source-State defendants. *Bell*, 734 F.3d at 196–98; *Merrick*, 805 F.3d at 686.

Merrell Dow also answers the balkanization argument Defendants borrow from *Cooper*. Doc. 20 at 21. The allegation they cite for it describes dispersion of air emissions within Rogers County and northeastern Oklahoma. Pet. ¶ 17. The defendant in *Merrell Dow* raised the same concern, arguing that state use and interpretation of a federal statute threatened “the order and stability” of the federal regime. 478 U.S. at 816. The Supreme Court’s response was that the concern was aimed at the wrong doctrine. A defendant who believes state litigation will unsettle a federal scheme “should be arguing . . . that the [statute] pre-empts state-court jurisdiction over the issue in dispute,” not that federal courts should take up the state-law claims as an exercise of federal-question jurisdiction. *Id.* Uniformity is protected another way, because the Supreme Court “retains power to review the decision of a federal issue in a state cause of action.” *Id.*; accord *Suncor*, 25 F.4th at 1267 & n.9.

Finally, Defendants add that their question is a new one. Doc. 20 at 9, 23. *Merrell Dow* rejected that as well: “We do not believe the question whether a particular claim arises under federal law depends on the novelty of the federal issue.” 478 U.S. at 817.

V. Defendants’ Rule Would Disrupt the Federal-State Balance Congress Approved.

Defendants offer a five-part description of the “rare” case their theory would remove: no source constructed, no permit issued, a permitting process pending, a petition relying on projected emissions, and injunctive relief requested. Doc. 20 at 22–23. The description is not a limit. Permit applications are pending across Oklahoma at any given time, and suits to enjoin a threatened nuisance are a staple of state equity practice. Under Defendants’ rule, the pendency of an application would

move each of those cases into federal court, and the State would lose its own forum precisely in the cases where it acts before harm occurs.

Congress said the opposite. Air pollution prevention and control at the source is “the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3). The Act preserves state authority to adopt and enforce more stringent requirements and preserves common-law rights. *Id.* §§ 7416, 7604(e). As the Tenth Circuit put it, allowing “any mismatch in the priorities evinced through state and federal law to warrant removal, in the absence of a substantial federal issue necessarily raised in the complaint, would lead to a major diminution in the power of state courts to enforce their own laws.” *Suncor*, 25 F.4th at 1267.

Defendants’ concern that this suit will displace the Department does not change the analysis. The Department is a state agency, and whether the Attorney General may sue to abate a threatened nuisance while a state permit application is pending is a question of Oklahoma law. Defendants have already briefed it as a question of primary jurisdiction. Doc. 13 at 16–19. It can and should be answered in Rogers County.

VI. The Removal Was Objectively Unreasonable, and Fees Remain Warranted.

Defendants answer the fee request by saying that *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014), required only notice pleading in the Notice of Removal, so their silence about *Suncor* was permissible. Doc. 20 at 12. *Dart Cherokee* addressed how a removing defendant must allege the amount in controversy. 574 U.S. at 89. It says nothing about whether a removal foreclosed by circuit precedent is objectively reasonable. The question under § 1447(c) is not what the Notice pleaded, but whether existing law gave Defendants an objectively reasonable basis to remove. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

Defendants’ remaining answer is that this case presents a question the Supreme Court “expressly left undetermined.” Doc. 20 at 9. The State does not suggest that a party may be sanctioned

for litigating an open question. But the question Defendants call open is a preemption question, and it goes to the merits. The rule that defeats this removal is not open at all. It has been settled since *Franchise Tax Bd.* that a federal defense, including preemption, cannot support removal, settled since *Merrell Dow* that arising-under jurisdiction does not turn on the novelty of the federal issue, and settled in this Circuit since *Suncor* that state nuisance claims against federally regulated emitters are not removable on this theory. Defendants still identify no decision from any court holding otherwise. Whatever the merits of their preemption defense, existing law gave them no objectively reasonable basis to litigate it here rather than in Rogers County. The State renews its request for costs and fees in an amount to be established by separate application.

CONCLUSION

Defendants' response asks this Court to keep a case that asserts only Oklahoma claims, seeks only Oklahoma remedies, and disclaims any federal right, because Defendants intend to argue that federal law bars the relief sought. That argument is nothing more than a defense, and it belongs in the state court the State chose. Accordingly, the State respectfully requests that the Court: (1) remand this action to the District Court of Rogers County, Oklahoma; (2) determine that Defendants lacked an objectively reasonable basis for removal; (3) award the State its just costs and actual expenses, including attorney fees, under 28 U.S.C. § 1447(c), in an amount to be established by separate application; and (4) grant such other relief as is just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2026, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing, which will transmit a Notice of Electronic Filing to the following ECF registrants: J. Christopher Davis, Kayci Bair Hughes, Bradley W. Welsh, Donald K. Shandy, and Timila Rother of Crowe & Dunlevy, attorneys for Defendants.

/s/Garry M. Gaskins, II

GARRY M. GASKINS, II